Office-Supreme Court, U.S.
FILED
FEB 17 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 776

THE MOSES H. CONE MEMORIAL HOSPITAL, *et al.*,
Petitioners,

—v.—

G. C. SIMKINS, *et al.*;
and the
UNITED STATES OF AMERICA.

BRIEF IN OPPOSITION TO CERTIORARI ON BEHALF OF RESPONDENTS G. C. SIMKINS, *ET AL.*

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Statement

Plaintiff, a group of Negro physicians, dentists and patients, brought this class action to enjoin two hospitals in Greensboro, North Carolina (The Moses H. Cone Memorial Hospital and Wesley Long Community Hospital, hereinafter called Cone and Long hospitals) and their administrators from continuing to deny them and other Negroes admission to staff and treatment facilities on the basis of race. They also sought declaration that a portion of the Hill-Burton Act (Hospital Survey and Construction Act of 1946, Act of August 13, 1946, 60 Stat. 1041, as amended; 42 U. S. C. §§291, *et seq.*) and a regulation pursuant thereto (42 C. F. R. §53.112; 21 Fed. Reg. 9841) were unconstitutional. These provisions authorize racial segregation or exclusion of Negroes from hospitals receiving grants under

the Act on a separate but equal theory, as an exception to a statutory requirement of racial nondiscrimination.

Long is a charitable hospital governed by a self-perpetuating board of twelve trustees (60a, 200a).* Cone too is a charitable hospital governed by fifteen trustees chosen for four year terms, as follows (50a-52a):

(a) Three by Governor of North Carolina;

(b) One by Greensboro City Board of Commissioners;

(c) One by Board of Commissioners of Guilford County, North Carolina;

(d) One by Guilford County Medical Society;

(e) Eight were appointed by Mrs. Bertha Cone until her death in 1947; now they are elected by entire Board of fifteen;

(f) One appointed by Board of Commissioners of Watauga County, North Carolina until 1961 amendment to charter; now elected by entire Board.

Both hospitals are licensed to operate under the North Carolina "Hospital Licensing Act" and regulations (122a-157a) which prescribe the management and operations of hospitals in great detail.[1] Enactment of the licensing law

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* Citations are to appellant's Appendix in the Court of Appeals.

[1] For example, the rules provide among other things for medical staff organization (123a); standards for facilities, organization, and procedures in surgical operating rooms (125a-126a); equipment, organization, and procedures for the obstetric department (126a-131a); separation of pediatric facilities from those for adults and the newborn nursing service (132a); circumstances for administration of anesthesia (132a); clinical pathological laboratories and blood tests (133a); that hospitals have adequate diagnostic x-ray and fluoroscopic examination facilities (134a); designated treatment facilities for emergency or outpatient service (134a);

was a prerequisite to participation in the Hill-Burton program (42 U. S. C. §§291f(a)(7), 291f(d)).

Both hospitals are exempt from *ad valorem* taxes assessed by the City of Greensboro and Guilford County at tax rates of $1.27 and $0.82 per $100 evaluation respectively. The cost of the Hill-Burton construction projects for the two hospitals set forth in this record (Cone: $7,367,023.32; Long: $3,927,385.40) indicates that their property is extremely valuable and that the value of the tax exemption is substantial for each hospital.[2]

Both hospitals have a variety of contacts with government[3] as a result of their involvement in the Hill-Burton hospital construction program. In summary, both hospitals have received large amounts of public funds, paid by the United States to the State of North Carolina and then by North Carolina to the hospitals. They received the funds as a part of a "State Plan" for hospital construction, which contemplates and authorizes them to exclude Negroes. This plan was approved by the Surgeon General of the United States. They are subject to a complex pattern of governmental regulations and controls arising out of Hill-Burton participation.

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isolation rooms (135a); regulation of hospital pharmacies (135a-136a); and records (136a-138a); organization of the nursing staff, including minimum numbers (138a-139a); detailed provision for hospital food service (139a-145a).

[2] Assuming assessment at 50% of actual value, and given the combined city-county rate of $2.09 per $100, Cone's exemption is worth about $76,985 per annum and Long's is worth about $40,681 per annum.

[3] Cone Hospital also participates in a nurses training program with two tax-supported state schools, the Woman's College of the University of North Carolina and the Agricultural and Technical College of North Carolina (an all Negro school). Student nurses at the schools receive part of their training at Cone (55a-57a) and carry out assignments at the hospital under the supervision of their teachers, including assisting doctors and nurses, treating patients, keeping hospital records, etc.

Federal Funds for Hospital Construction

When this action was commenced, the United States had appropriated $1,269,950.00 to Cone and $1,948,800.00 to Long. Cone's allocation amounted to about fifteen percent of the total construction expenses involved in its two projects. Long's share constituted about fifty percent of the total cost of its three projects (203a-204a).

The following table summarizes the various grants.*

CONE HOSPITAL

Project No. and Year Approved	Purpose	Federal Funds Appropriated 5/8/62	Total Cost of Project	Federal % of Cost
NC-86 (1954)	General hospital construction	$ 462,000.00	$5,277,023.32	—
NC-330 (1960)	Diagnostic and treatment center; general hospital construction	807,950.00	2,090,000.00	—
TOTAL		$1,269,950.00**	$7,367,023.32	17.2%

LONG HOSPITAL

NC-311 (1959)	New hospital construction	$1,617,150.00	$3,314,749.40	—
NC-353 (1961)	Laundry	66,000.00	120,000.00	—
NC-358 (1961)	Hospital Nurses Training School	265,000.00	492,636.00	—
TOTAL		$1,948,800.00**	$3,927,385.40	49.6%

* The District Court found "approximately" 15% for Cone and "approximately" 50% for Long.

** All funds to Cone had been paid as of 5/8/62; $1,596,301.60 had been paid to Long by that date.

* See, generally, Findings 11 through 17 (201a-204a). Further details appear in the original record, Exhibits A through E to plaintiffs' Motion for Summary Judgment. (Parts of Exhibit B appear at 93a-103a.)

General Facts About Hill-Burton Program

The Hill-Burton program requires that states wishing to participate must inventory existing facilities to determine hospital construction needs and develop construction priorities under federal standards. State agencies designated to perform this function are to adopt state-wide plans for hospital construction to be approved by the Surgeon General of the United States. The Act provides for grants of federal funds to construct new or additional facilities for government owned and voluntary nonprofit hospitals.[5]

The Surgeon General has authorized state plans to meet the racial nondiscrimination requirement of 42 U. S. C. §291e(f) by approving plans for separate facilities for "separate population groups" (42 C. F. R. §53.112). When state plans are submitted on this basis, the state agency and the Surgeon General may waive the requirement that facilities built under the Act "be made available without discrimination on account of race, creed or color, to all persons residing in the area to be served by that facility" (42 C. F. R. §53.112; see also, §53.111).

The North Carolina State Plan

In North Carolina the state agency authorized to operate under the Hill-Burton program is the North Carolina Medical Care Commission (N. C. Gen. Stats. §131-120). The Medical Care Commission has adopted and periodically revised a "State Plan" for separate facilities for Negroes and whites in the Greensboro area (120a):

Area	Name of Facility	Location	Existing Acceptable Beds: White	Existing Acceptable Beds: Non-White
B-6	L. Richardson Memorial Hospital	Greensboro	0	91
	Wesley Long Hospital	Greensboro	220	0
	Moses H. Cone Hospital	Greensboro	482	0
	Subtotals		702	91

[5] A useful description of the over-all program and of the various types of hospitals is contained in the "Affidavit and Report" of the General Counsel of

Accordingly, when the various project applications were made by Cone and Long, the required assurance against racial discrimination was waived by the Medical Care Commission and this was approved by the Surgeon General.[6]

Division of Federal and State Controls

The overall plan of the Hill-Burton program reflects a division of power and responsibility between federal and state governments for control and supervision of various matters affecting participating hospitals. These provisions may be sorted into seven categories: (1) control over construction contracts and the construction period; (2) control over details of hospital construction and equipment; (3) control over future operation and status of hospitals; (4) control over details of hospital maintenance and operation; (5) control of size and distribution of facilities; (6) rights of project applicants and state agencies; and (7) regulation of racial discrimination. The character of this "intricate pattern of governmental regulations, both state and federal" is summarized by the Court of Appeals at 323 F. 2d 964-65.

Opinions of the Courts Below

The district court found that racial discrimination was "clearly established" (205a) and that the "sole question" was whether "defendants have been shown to be so im-

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the Department of HEW who was the principal technical draftsman of the law (173a-188a). This Report was filed in the district court by the United States.

[6] On Projects NC-86 and NC-330, the Cone Hospital initially gave an assurance of nondiscrimination, but this was withdrawn with the approval of the Medical Care Commission and the Surgeon General, on the ground that "the non-discrimination agreement was erroneously executed as a result of clerical inadvertence" for which the Commission was responsible (104a-106a, 201a-202a).

pressed with a public interest as to render them instrumentalities of government, and thus within the reach of the Fifth and Fourteenth Amendments . . . " (206a-207a). After examining defendants' various relationships with federal and state governmental agencies, the court concluded that defendants were not subject to constitutional restraints against discrimination (221a). For this reason, the court refused to decide the validity of the separate but equal provision of the Hill-Burton Act (220a).

On November 1, 1963 the Court of Appeals for the Fourth Circuit, sitting *en banc*, reversed the decision of the District Court, 323 F. 2d 959 (4th Cir. 1963). The Court, per Sobeloff, Chief Judge, found the necessary "'degree of state [in the broad sense, including federal] participation and involvement'", 323 F. 2d at 967,[7] present as a result of the participation by the hospitals in the Hill-Burton program. The court emphasized massive use of public funds, "extensive state-federal sharing" in a common plan for state hospital development, and that the Hill-Burton program was not limited to the granting of aid to individual hospitals: "'It shows rather a Congressional design to induce the states upon joining the program to undertake the supervision of the construction and maintenance of adequate hospital facilities throughout their territory. Upon joining the program a participating state in effect assumes as a state function the obligation of planning for adequate hospital care.'" 323 F. 2d at 967-69. In addition, the court emphasized that the challenged discrimination had been sanctioned affirmatively by state and federal governments pursuant to federal law and regulation. 323 F. 2d at 968; 42 U. S. C. §291e(f); 42 C. F. R. §53.112.

The court also held that the constitutionality of the provisions of the Hill-Burton Act which authorized racial

[7] The brackets are in the court's opinion.

discrimination was properly before it. Finding in the legislative history of the Act a desire on the part of Congress to permit the states to develop programs of hospital construction that would provide adequate service "to all their people" 42 U. S. C. §291a, the court held, "it served the dominant Congressional purpose best to prune from the statutory provision only that language which adopted what is now known to be an unconstitutional means of establishing a constitutional end." 323 F. 2d at 969. The court, therefore, let stand the general prohibition against discrimination in 42 U. S. C. §291e(f) and found unconstitutional the exception tolerating separate but equal facilities:

> . . . but an exception shall be made in cases where separate hospital facilities are provided for separate population groups if the plan makes equitable provisions on the basis of need for facilities and services of like quality for each such group . . .

ARGUMENT

I.

The Decision of the Court Below Enjoining Racial Discrimination at Hospitals Closely Regulated and Controlled by Government and Receiving Large Amounts of Public Funds as Part of a State Plan for Hospital Construction Was Clearly Correct and Presents No Questions Cognizable Under Rule 19(1)(b) of the Rules of This Court.

Decisions of this Court leave little doubt that governmental action as broad, significant, and effective as that found in this case involves Fifth Amendment due process[8] and Fourteenth Amendment due process and equal protection[9] strictures against racial discrimination. Racial discrimination is constitutional only when "unsupported by State authority in the shape of laws, customs, or judicial, or executive proceedings" or when "not sanctioned in some way by the State."[10] Discrimination is forbidden when the State participates "through any arrangement, management, funds or property"[11] or when the State places its "power, property or prestige" behind the discrimination.[12]

In this case racial segregation, which repeatedly has been held to constitute discrimination *per se* since *Brown*

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[8] *Bolling* v. *Sharpe*, 347 U. S. 497; *Hirabayashi* v. *United States*, 320 U. S. 81, 100.

[9] *Brown* v. *Board of Education*, 347 U. S. 483; *Cooper* v. *Aaron*, 358 U. S. 1, 19.

[10] *Civil Rights Cases*, 109 U. S. 3, 17.

[11] *Cooper* v. *Aaron*, 358 U. S. 1, 4, 19.

[12] *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725.

v. *Board of Education*, 347 U. S. 483, has been explicitly authorized by a federal statute[1] antedating *Brown*. The discrimination has been approved by agencies and officials of North Carolina and the United States (93a, 99a, 113a, 120a). Large sums of public moneys have been expended by government to support the hospitals. They have submitted to a comprehensive pattern of state and federal controls in return for these funds and have become part of a state master-plan for hospital construction on a statewide basis. The hospitals are aided by the state because they fulfill a public function which the state would have to perform if the hospitals did not. North Carolina has granted these hospitals the power to operate and the privilege of receiving federal aid.[2] See 323 F. 2d at 967-68.

The petition for certiorari filed by the hospitals suggests that the Court of Appeals determined that the hospitals should be restrained from racial discrimination solely on the ground that they have received money from the United States. Reasoning from this faulty premise, petitioners urge that the court below sanctioned a rule of limitless application which would apply the Constitution to every area of human endeavor. The parade of "horribles" suggested by petitioners (see Petition for Certiorari, pp. 8-10) bears, however, no relationship to the carefully worded and limited opinion of the Court of Appeals. In their zeal to obtain review before this Court, petitioners have asked the Court to review a decision never rendered.

Applying the principles of *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, the Court of Appeals found

[1] 42 U. S. C. §291e(f); 42 C. F. R. §53.112.

[2] In addition, as to Cone, two other factors should be noted: (1) the State has passed legislation directing public officials to appoint members of its governing Board and (2) the State has chosen to train students enrolled at public colleges at the hospital.

that receipt of large sums as part of a complex statutory plan[15] for the construction of hospitals on a state-wide basis resulted in application of the Fifth and Fourteenth Amendments, 323 F. 2d at 965-67. The court also relied on the Congressional purpose (as shown in the legislative history of the Hill-Burton Act) to induce the states to assume the responsibility for planning the construction, financing, and regulation of adequate hospital facilities throughout the state, and the affirmative sanction of the hospitals' racial discrimination given by Hill-Burton Act and regulations, 323 F. 2d at 968.

The decision of the Court of Appeals is rooted in the peculiar soil of the Hill-Burton program. For example, these hospitals are subject to a variety of government controls by virtue of their participation in the federal-state hospital construction program. The character of the physical facilities and the equipment of the hospitals is closely controlled by both federal and state governments. The effect of this regulation of construction and equipment on the future operations of the hospitals is manifest. Requir-

[15] Petitioners earnestly contend that the Hill-Burton Act itself expressly disclaims any federal right to exercise supervision or control over the administration of any hospitals receiving funds under the Act and rely on 42 U. S. C. §291m. Section 291m states:

> *State control of agencies.*—Except as otherwise specifically provided, nothing in this subchapter shall be construed as conferring on any federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any hospital, diagnostic or treatment center, rehabilitation facility, or nursing home with respect to which any funds have been or may be expended under this subject.

Petitioners' reliance on this provision is misplaced. The provision states, "except as otherwise specifically provided," and the Hill-Burton Act and regulations specifically provide for a great amount of control. 323 F. 2d at 964, 965. Secondly, the provision is entitled, "State control of agencies," and can at the most be taken to mean that where there is possible conflict between state and federal agencies, state regulation should prevail.

ing that a hospital build and arrange a particular department and stock it with approved equipment obviously determines the character of the service the hospital will render in the future. Beyond this, the federal statute requires that the states must directly regulate the details of hospital maintenance and operation. In order to participate in the Hill-Burton program North Carolina had to undertake an elaborate regulatory and licensing scheme (42 U. S. C. §§291f(a)(7), 291f(d)). This state control over the defendant, hospitals' operation is exact and detailed (see footnote 1, *supra*).

The funds paid to these hospitals under the Hill-Burton Act are to be used solely for carrying out the project as approved by the State and Surgeon General.[16] If the hospitals sell or transfer ownership within twenty years to anyone not qualified under the Act to apply for funds or not approved by the state agency, or if the hospitals cease to be nonprofit, the United States is authorized to recover the present value of the federal share of the approved project.[17]

Under Hill-Burton, the number and distribution of hospital beds in an area is decided by State and Federal Governments. Once funds are granted bringing an area up to the standard of hospital beds considered adequate for the population, no further beds can be programmed. If North Carolina had chosen to build publicly owned hospitals in Greensboro, Cone and Long could have been denied all federal aid. On the other hand, the aid granted them now prohibits the construction of duplicating city, county, or other nonprofit facilities with federal aid. The participat-

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[16] 42 U. S. C. §291h(d).

[17] 42 U. S. C. §291h(e).

ing hospitals have become the chosen and exclusive instruments to carry out governmental objectives.

In addition to operating "as integral parts of comprehensive joint or intermeshing state and federal plans," 323 F. 2d at 967, the Cone and Long hospitals are the beneficiaries of approximately 1.2 and 1.9 million dollars, respectively, paid to them through the Treasurer of the State of North Carolina, from the United States of America under the Hill-Burton program. Prior to receipt of Hill-Burton assistance, Long Hospital operated a 78-bed hospital considered obsolete by North Carolina (160a) and unsuitable by the United States of America (93a). Long has now constructed and operates a 220-bed modern hospital, a nurses training school and has a $120,000 laundry constructed under Hill-Burton with 50 per cent federal funds. Cone Hospital has completed construction of a 300-bed hospital, a 182-bed addition, and a diagnostic and treatment center with the assistance of the United States and the State of North Carolina under the Hill-Burton program.

These federal grants in excess of a million dollars to each hospital distributed in accordance with state and federal priorities obviously are substantial. (The tax exempt status of the hospital's property increases the financial subsidy. Cf. *Burton* v. *Wilmington Parking Authority*, 365 U. S. at 724.)

The effect of governmental subsidy upon an otherwise private entity is highly relevant in deciding whether the restraints of the Constitution should apply. The argument of petitioners that the effect of three million dollars of public funds on the hospitals is insignificant for purposes of the Fifth and Fourteenth Amendments is erroneous. Here, there is a governmental participation through an "arrangement," "funds," and "property" calling for the ap-

plication of constitutional principles against discrimination. *Cooper* v. *Aaron*, 358 U. S. 1, 4, 19. It would be difficult to know what *Cooper* v. *Aaron* means if it does not embrace contributions of funds in the million dollar range to build tax exempt property.

Affirmative Governmental Sanction of Discrimination

In addition to the interrelation of the hospitals with government, an additional factor compels the conclusion that the discrimination practiced is within the purview of the Constitution. This discrimination was sanctioned affirmatively by a federal statute and regulations, and by a state plan for hospital construction on a segregated basis. The conduct of private persons is insulated from constitutional requirements only insofar as it is "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings" or is "not sanctioned in some way by the State." *Civil Rights Cases*, 109 U. S. 3, 17. Here the affirmative state sanction of racial segregation (the state plan for segregation in the Greensboro area) enables the hospitals to avoid giving an assurance not to discriminate as a condition of receiving the funds. This is in accord with the Hill-Burton Act (42 U. S. C. §291e(f)) which allows the states to authorize segregation in either government hospitals or nonprofit hospitals. As segregation is supported by federal statute and regulations and by state executive decisions, i.e., the state plan, the decision of the Court of Appeals enjoining discrimination is clearly correct. See 323 F. 2d at 968 n. 16, and cases cited.

II.

Those Portions of Title 42 U. S. C. §291e(f) and 42 C. F. R. §53.112 Which Authorize Racial Discrimination Are Clearly Unconstitutional.

The provisions of the Hill-Burton Act and regulations declared unconstitutional by the court below authorize hospitals receiving federal funds to segregate or exclude Negroes on a separate but equal basis as an exception to a general statutory policy of nondiscrimination.

Since *Brown* v. *Board of Education*, 347 U. S. 483, the "separate but equal" doctrine has been repudiated in regard to every type of facility to which it was applied.[18] Insofar as the Hill-Burton Act and federal regulations authorize the defendants as agencies of the state and federal governments to engage in racial discrimination, these provisions obviously conflict with the Fifth and Fourteenth Amendments. *Bolling* v. *Sharpe*, 347 U. S. 497; *Brown* v. *Board of Education*, *supra*.

The hospitals seek to avoid the massive weight of this authority by contending that the act does not require discrimination but simply provides that a nondiscrimination assurance will be waived when separate facilities are provided for Negroes in the community. That the provision is cast in terms of a waiver permitted by government in no way changes its unconstitutionality. The Kansas statute ruled unconstitutional by this Court in *Brown* v. *Board of*

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[18] *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 387 (4th Cir. 1955), aff'd 350 U. S. 877; *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Gayle* v. *Browder*, 352 U. S. 903; *Bailey* v. *Patterson*, 369 U. S. 31; *Turner* v. *Memphis*, 369 U. S. 350; *New Orleans City Park Improvement Association* v. *Detiege*, 358 U. S. 54; *State Athletic Commission* v. *Dorsey*, 359 U. S. 533; *Johnson* v. *Virginia*, 373 U. S. 61.

Education, supra, authorized and did not require racial discrimination.[19]

As the act and regulations authorize the discrimination which the Court of Appeals found unconstitutional and enjoined, the constitutionality of the act and regulations are necessarily presented for decision. To the extent that the Constitution forbids racial discrimination by the hospitals, it also forbids statutory authorization of such discrimination.

To argue as do the hospitals that even if their conduct is subject to constitutional responsibility, respondents are not entitled to declaratory relief—declaring the statute which authorized such conduct unconstitutional—would be inconsistent as well as potentially confusing.[20] To be sure, settled principles of constitutional construction reflect judicial concern with *unnecessary* decisions of constitutional questions.[21] But there is no suggestion in the cases—and more important in the theory of judicial restraint underlying them—that a statute authorizing invalid conduct will

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[19] See also *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 726-27, Mr. Justice Stewart concurring; *McCabe* v. *Atchison Topeka and S. F. R. Co.*, 235 U. S. 151; cf. *Lombard* v. *Louisiana*, 373 U. S. 267; *Baldwin* v. *Morgan*, 287 F. 2d 754 (5th Cir. 1961); *Gantt* v. *Clemson Agricultural College of S. Car.*, 320 F. 2d 611 (4th Cir. 1963), cert. den. 375 U. S. 814.

[20] The United States argued forcefully in the district court that failure to adjudicate the constitutionality of the Act in such a context would subject the administration of the Act to uncertainty and subject the United States to possible liability for maladministration. "Not only is it unseemly for a high executive official of the United States to continue administering a statute which under the decisions of the courts seems clearly unconstitutional, but if the Surgeon General misconceives his legal obligations under the Act he may well subject himself to suit by those injured by his conduct." (Memorandum in support of Conclusions of Law Proposed by the United States, p. 21.)

[21] See *Ashwander* v. *Tenn. Valley Authority*, 297 U. S. 288, 345 et seq.

not be declared unconstitutional when the conduct itself is held unconstitutional. Such a result would turn a rule of avoidance of *unnecessary* constitutional decisions into a rule of abdication. Failure to declare the separate but equal provisions of the Hill-Burton Act unconstitutional would not be avoidance of a decision of "gravity and delicacy"[22] for fundamental reasons of political organization but a simple failure to articulate an inescapable conclusion. In *Turner* v. *Memphis*, 369 U. S. 350, relied on by the hospitals, a *state* statute might have, under a strained construction, permitted the conduct enjoined and the court was merely applying settled principles of comity in not construing the statute. Here, a federal statute authorizes unequivocally the racial segregation enjoined. Secondly, in *Turner* Negro plaintiffs did not seek a declaration of the unconstitutionality of the statute.

Apart from vague notions of judicial restraint, the hospitals suggest no viable theory upon which failure to adjudicate the constitutional question should be based. Negro physicians, dentists and patients surely have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens presentation of issues" which was said in *Baker* v. *Carr*, 369 U. S. 186, 204, to be the "gist of the question of standing." And it is not material that the hospitals did not rely explicitly on the Hill-Burton Act provision authorizing segregation. They have received the benefit of and acted in accordance with its terms, and they have defended the practice which the statute authorizes. The constitutionality of a statute of the United States is inescapably bound up in this litigation, and the question is not avoided because it is not fully articulated in a defensive pleading. The hospitals did not defend explicitly on the basis of the validity of

[22] *Ibid.*

their statutory authorization to segregate because decisions of this Court made the success of such an argument improbable. Any suggestion that this constitutional question is not shaped by the record is without merit.

In summary, the decision below accords with principles recently articulated by this Court. There is no conflict of circuits; nor is there any other persuasive reason why certiorari should be granted.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondents pray that the writ of certiorari be denied.

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